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First report on the effects of armed conflicts on treaties

by Mr. Ian Brownlie, Special Rapporteur

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A. Inclusion of the topic in the agenda of the Commission

1. The topic "Effects of armed conflicts on treaties" was included in the International Law Commission's long-term programme of work during its fifty-second session, in 2000.[1] A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission.[2] In its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion.

2. At its fifty-sixth session, in 2004, the Commission decided to include the topic "Effects of armed conflicts on treaties" in its current programme of work, and to appoint Ian Brownlie Special Rapporteur for the topic.[3] The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

B. Structure of the report

3. The present report consists of two parts:

(a) An introduction discussing the conceptual background and certain questions of method;

(b) A complete set of draft articles with commentaries. The presentation of a complete set of draft articles was believed to be appropriate in the light of the interaction of the individual articles and the relatively limited ambit of the subject matter.

C. Introduction

1. Conceptual background

4. There is a certain rather limited value in indicating the concepts which appear in the doctrine as explanations of the legal regime posited by individual writers. There is, in any case, no generally accepted opinion.

5. Some four rationales appear altogether, and may be summarized as follows:

(a) War is the polar opposite of peace and involves a complete rupture of relations, and a return to anarchy. It follows that all treaties are annulled without exception. The right of abrogation arises from the occurrence of war regardless of the original intention of the parties;

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[1] See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), paras. 726-733.

[2] Ibid., annex.

[3] Ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. At the same session, it was also decided to include the topic "Expulsion of aliens" in the Commission's current programme of work.

(b) The test is compatibility with the purposes of the war or the state of hostilities:[4] this is also expressed in the form that treaties remain in force subject to the necessities of war;[5]

(c) The criterion is the intention of the parties at the time they concluded the treaty;

(d) A separate strand in the doctrine is related to the datum that since 1919, and especially since the appearance of the Charter of the United Nations, States no longer possess a general competence to resort to the use of force, except in case of legitimate defence.[6] It follows that the use of force should not be recognized as a general solvent of treaty obligations.

6. This collection of rationales is not of great assistance. The thinking is relatively unsophisticated and incoherent. Moreover, apart from (c), the generalizations involved tend to be pre-legal and full of ambiguity.

7. An alternative approach would be to seek to categorize the problem either as a part of the law of treaties or as a part of the law relating to armed conflict. In 1963 and again in 1966 the Commission appeared to adopt the position that the question of the effect of the outbreak of hostilities upon treaties was not properly a part of the law of treaties. Thus in its report to the General Assembly in 1966 the Commission reported as follows:[7]

> "At its fifteenth session, in 1963, the Commission concluded that the draft articles should not contain any provisions concerning the effect of the outbreak of hostilities upon treaties, although this topic might raise problems both of the termination of treaties and of the suspension of their operation. It was explained in the report of 1963 that:
>
> > 'The Commission considered that the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question; and it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties.[8]'"

8. When this reasoning is examined it can be seen that, while the inhibiting factor is clearly indicated, the Commission is not taking the position that the topic, as a matter of essence, lies outside the frontier of the law of treaties. The emphasis is upon what "could conveniently be dealt with". In any case, the subject of the effect of the outbreak of hostilities between States is expressly excluded from the Vienna Convention on the Law of Treaties (see art. 73).

9. In the Commentary to draft article 69 of the report to the General Assembly, the Commission adopted a rather different tone and introduced a strong element of policy:

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[4] See Hall, *International Law*, 8th ed., 1924, p. 454.

[5] See *Annuaire de l'Institut de droit international*, 1912, p. 648.

[6] See Reuter, *Droit International Public*, 6th ed., 1983, p. 158.

[7] *Yearbook of the International Law Commission*, 1966, II, p. 176, para. 29.

[8] *Yearbook of the International Law Commission*, 1963, II, p. 189, para. 14.

"Both these matters may have an impact on the operation of certain parts of the law of treaties in conditions of entirely normal international relations, and the Commission felt that considerations of logic and of the completeness of the draft articles indicated the desirability of inserting a general reservation covering cases of succession and cases of State responsibility.

"(2) Different considerations appeared to the Commission to apply to the case of an outbreak of hostilities between parties to a treaty. It recognized that the state of facts resulting from an outbreak of hostilities may have the practical effect of preventing the application of the treaty in the circumstances prevailing. It also recognized that questions may arise as to the legal consequences of an outbreak of hostilities with respect to obligations arising from treaties. But it considered that in the international law of today the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States. Thus, the Geneva conventions codifying the law of the sea contain no reservation in regard to the case of an outbreak of hostilities notwithstanding the obvious impact which such an event may have on the application of many provisions of those Conventions; nor do they purport in any way to regulate the consequences of such an event. It is true that one article in the Vienna Convention on Diplomatic Relations (art. 44) and a similar article in the Convention on Consular Relations (art. 26) contain a reference to cases of 'armed conflict'. Very special considerations, however, dictated the mention of cases of armed conflict in those articles and then only to underline that the rules laid down in the articles hold good even in such cases. The Vienna Conventions do not otherwise purport to regulate the consequences of an outbreak of hostilities; nor do they contain any general reservation with regard to the effect of that event on the application of their provisions. Accordingly, the Commission concluded that it was justified in considering the case of an outbreak of hostilities between parties to a treaty to be wholly outside the scope of the general law of treaties to be codified in the present articles; and that no account should be taken of that case or any mention made of it in the draft articles.[9]"

10. Text-writers of the modern era assume that the more attractive categorization is the law of treaties, and the Special Rapporteur considers that this approach rests upon sound principles.

2. Some questions of method

11. Writers have, over several generations, insisted on the uncertainties which beset the topic. Writing in 1921 Sir Cecil Hurst observed:

"There are few questions upon which people concerned with the practical application of the rules of international law find the textbooks less helpful than that of the effect of war upon treaties in force between belligerents. Both the practice of States, as exemplified in the provisions of treaties of peace, and the

[9] *Yearbook of the International Law Commission*, 1966, II, pp. 267-268.

pronouncements of statesmen appear to conflict with the principles laid down by the textbooks."[10]

In the seventh edition of volume II of *Oppenheim's International Law*, Hersch Lauterpacht wrote (in 1948):

> "The doctrine was formerly held, and is even nowadays held by a few writers, that the outbreak of war ipso facto cancels all treaties previously concluded between the belligerents, excepting only those concluded especially for war. But the vast majority of modern writers on international law have abandoned this standpoint, and the opinion is pretty general that war by no means annuls every treaty. But unanimity as to what treaties are or are not cancelled by war does not exist. Neither does a uniform practice of the States exist, cases having occurred in which States have expressly declared that they considered all treaties annulled through war. Thus the whole question remains as yet unsettled."[11]

In a monograph published in 2000 Anthony Aust, referring to Oppenheim (quoted above), noted that:

> "The legal effect of the outbreak of hostilities between parties to a treaty is still uncertain, and the only comprehensive treatment of the subject is now out of date. The topic is outside the scope of the Convention (art. 73), the International Law Commission having adopted the, perhaps rather high-minded, attitude that 'in the international law of today [1966] the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States.'"[12]

12. In face of the prevailing level of uncertainty and contradiction in the sources of the law, certain prophylactic measures are necessary. The first such measure is to provide draft articles, on an interim basis, which reflect certain elements in the doctrine, even though the propositions in question are, in the opinion of the Special Rapporteur, flawed in one or more respects. This policy will facilitate the confronting of difficulties at an early stage.

13. In the same perspective, it is intended that at the close of the current session a good number of draft articles will be in the public domain, thus providing an effective basis to attract the comments of Governments and, in particular, information on State practice. It is, after all, reasonable to expect that an enhanced access to State practice will allow the Commission to pursue its mission of clarifying the law.

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[10] *British Year Book of International Law*, vol. 2, 1921-1922, p. 38.

[11] *Oppenheim's International Law*, vol. II, 1948, pp. 302-303, para. 99 (footnotes omitted).

[12] Aust, *Modern Treaty Law and Practice*, 2000, p. 243 (footnotes omitted).

D. Draft articles

Draft article 1
Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

Comment

14. The provisions of article 1 of the Vienna Convention on the Law of Treaties have been followed (see also art. 1 of the Vienna Convention on Succession of States in respect of Treaties). The term "treaty" is defined in article 2 below.

Draft article 2
Use of terms

For the purposes of the present draft articles:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(b) "Armed conflict" means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Comment

Treaty

15. The definition is taken from the Vienna Convention on the Law of Treaties. The meaning and application of the definition is elucidated in the commentary of the Commission in the report of the Commission to the General Assembly.[13] The definition is adequate for present purposes and, in any case, it is not appropriate for the Commission to seek to revise the Vienna Convention.

Armed conflict

16. The definition offered is based upon the formulation adopted by the Institute of International Law in its resolution of 28 August 1985. There can be no doubt that the work of the Commission will be much delayed if a high level of sophistication is sought. Writers have usually pointed to certain rough edges and apparent flaws in such a definition. Thus McNair and Watts point to the fact that a state of war may exist even if no armed force is being employed by the opposing parties and no

[13] *Yearbook of the International Law Commission*, 1966, II, pp. 187-189, paras. 1-8.

actual hostilities between them are occurring.[14] The definition promoted by the Institute of International Law is reasonably comprehensive.[15] Certain difficulties persist, however. Thus, the definition, by relying upon the genus of "armed conflict", does not necessarily include a state of war in the absence of armed operations. Policy reasons indicate the inclusion of a blockade even in the absence of armed actions between the parties.[16]

17. Contemporary armed conflicts have blurred the distinction between international and internal armed conflicts. The number of civil wars has increased. In addition, many of these "civil wars" include "external elements", such as support and involvement by other States in varying degrees, supplying arms, providing training facilities and funds, and so forth. Internal armed conflicts could affect the operation of treaties as much as, if not more than international armed conflicts.[17] The draft articles proposed by the Special Rapporteur therefore include the effect on treaties of internal armed conflicts. This approach provides an opportunity for the Commission as well as for Governments to consider the proposal and express their views.

18. At the same time there is a consensus in the doctrine on the basic character of the distinction between international armed conflict and non-international armed conflict.[18]

19. There is also the question of the case of an occupation of territory which meets with no armed resistance. In this context the provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict are of considerable interest. Thus, article 18 provides in relevant part as follows:

> "*Article 18 — Application of the Convention*
>
> "1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.
>
> "2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

20. The decisions of municipal courts on the definition of "war" for present purposes are not of much value.

21. The definition proposed above refers to "armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict". This formulation is contextual and, it is to be presumed,

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[14] See McNair and Watts, *The Legal Effects of War*, 1966, pp. 2 and 3.

[15] See the *Annuaire de l'Institut de droit international*, vol. 59 (II), 1982, pp. 210-212.

[16] On which see McNair and Watts, op.cit., pp. 20 and 21.

[17] See "The effect of armed conflict on treaties: an examination of practice and doctrine", Memorandum by the Secretariat (A/CN.4/550), paras. 148-150, thereafter cited as Secretariat Memorandum.

[18] See Broms, *Annuaire de l'Institut de droit international*, vol. 59 (I), 1981, pp. 224-229; David, *Principes de droit des conflits armés*, 2nd ed., 1999, pp. 96-118, paras. 1.45-1.69; Salmon, *Dictionnaire de droit international public*, 2001, pp. 233-234; Kolb, *Ius in bello: le droit international des conflicts armés, Précis*, 2003, paras. 138-185.

indicates that two factors are to be taken into account by decision-makers: (a) the nature or extent of the armed operations; and (b) the content of the treaty concerned and the intention of the parties.

22. This mode of application of the definition is to be commended precisely because it avoids treating the interposition of an armed conflict as having an automatic effect in relation to all the treaty relations of the States concerned. Instead, the effect is articulated in order to make sense in terms of the specific treaty obligations. This factor should be kept in mind in the process of making any amendments to the draft article.

23. The definition, it will be noted, makes no reference to the principles relating to the legality of the use or threat of force. The Institute of International Law dealt with the issue in two articles of the resolution adopted in 1985, as follows:

> "*Article 7*
>
> "A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.
>
> "...
>
> "*Article 9*
>
> "A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State."

24. The question of legality will be examined below.

Draft article 3
Ipso facto termination or suspension

The outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties as:

(a) Between the parties to the armed conflict;

(b) Between one or more parties to the armed conflict and a third State.

Comment

25. This formulation is a replication of article 2 of the resolution adopted by the Institute of International Law in 1985. The principle has been commended by a number of authorities. *Oppenheim*, edited by Hersch Lauterpacht, asserts that "the opinion is pretty general that war by no means annuls every treaty" (*Oppenheim's International Law*, vol. II, *Disputes, War and Neutrality*, 1948, p. 302). Lord McNair, expressing what are substantially British views, states: "It is thus clear that

war does not per se put an end to pre-war treaty obligations in existence between opposing belligerents."[19]

26. During the work of the Institute in 1983 Professor Briggs stated that:

> "Our first — and most important — rule is that the mere outbreak of armed conflict (whether declared war or not) does not ipso facto terminate or suspend treaties in force between parties to the conflict. This is established international law."[20]

27. The formulation provoked some opposition within the Institute, but this was probably caused by a misunderstanding of the intention of the authors. As Professor Denise Bindschedler-Robert pointed out, the purpose of the article was not to prevent the termination of treaties in force in case of an outbreak of an armed conflict, but to specify that such outbreak did not necessarily, and of its own accord, bring about the termination of treaties in force: see the *Annuaire de l'Institute* (vol. 61 (II), p. 215). In the event article 2 (as in the Institute draft) was adopted by 33 votes to one, with 9 abstentions (ibid., p. 217).

28. Draft article 3 is not unproblematical. It can be defended as a useful and logical beginning which lays a foundation. However, at one level it might be considered to be redundant. It is not strictly substantive and the principles according to which treaties survive the outbreak of an armed conflict are set forth in the subsequent articles. However, properly understood, the provision constitutes an important source of clarification. If it is considered that it be kept in the draft, it would be helpful to replace the locution "ipso facto" with "necessarily".

Draft article 4
The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

(a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(b) The nature and extent of the armed conflict in question.

Comment

29. The modern doctrine contains two general principles which are different in character but perhaps not in essence. One of these general principles is based upon the intention of the parties, but this is supplemented by a series of presumptions related to the object and purpose of treaties whose express provisions do not indicate the intention of the parties with sufficient clarity.

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[19] *The Law of Treaties*, 1961, p. 697.

[20] *Annuaire de l'Institut de droit international*, vol. 61 (I), pp. 8 and 9; and see also Briggs, *The Law of Nations*, 2nd ed., 1953, p. 938.

30. The second general principle does not refer explicitly to the intention of the parties and propounds a general principle of termination (*caducité*). However, this principle is allied to recognition of a number of substantial exceptions based upon the object and purpose and judicial practice. The second general principle is commonly adopted by the doctrine in the French language.

31. The principle rests upon two elements:

(a) The irrebuttable presumption, based upon State practice, that bilateral treaties are terminated, subject to express provisions indicating the contrary;

(b) Reliance upon the object and purpose of various types of treaty as the basis for determining the question of termination.

32. The doctrine supporting the major role of intention must be examined. An early and distinguished proponent was Sir Cecil Hurst. His careful exposition deserves full quotation:

> "In earlier days writers seem to have treated the character of the war as the factor which would determine its effect upon the treaties in force between the belligerents. In more modern times it is the character of the treaty, or of the particular provision in a treaty, which is regarded as the important element in determining the effect which an outbreak of war will have upon it. I cannot help doubting whether it is the character and nature of the treaty stipulation which is really the decisive element, and I submit, for the consideration of those who can devote themselves to a study of the subject, that the true test as to whether or not a treaty survives an outbreak of war between the parties is to be found in the intention of the parties at the time when the treaty was concluded. I submit that just as the duration of contracts between private persons depends on the intention of the parties, so also the duration of treaties between States must depend on the intention of the parties, and that the treaties will survive the outbreak of war or will then disappear, according as the parties intended when they made the treaty that they should so survive or disappear.
>
> "If the above is the true test, the problem which must be faced by international lawyers is that of formulating a series of presumptions to meet the cases where the words in the treaty itself do not show clearly what was the intention of the parties at the time when they made it. Where that intention was clearly expressed, it is obvious that it must prevail, not because of some principle of law as to the maintenance or abrogation of treaties, but because it was the precise purpose which the contracting parties had in mind when they entered into their agreement. If two States go to war between whom a treaty exists that in the event of war their respective nationals should have so many months to withdraw from each other's territories, the reason why that treaty remains in force after the outbreak of the war is not that there is a principle that in general all treaties between the belligerents remain in force, or that it is one of a class which constitutes an exception to the general principle that war abrogates all treaties between belligerents, but because the parties clearly expressed their intention that it should so remain in force. The cases that present difficulties are where the treaty provides no clear indication of the intentions of the parties, and where that intention must be presumed from the nature of the treaty or from the concomitant circumstances. To meet these

cases a code of rules, well thought out from the practical as well as from the scientific point of view, is much wanted."[21]

33. Having quoted the first paragraph of Hurst's article above, Lord McNair observed:

> "It is believed that in the vast majority of cases, if not in all, either of these tests would give the same result, for the nature of the treaty is clearly the best evidence of the intention of the parties. Thus, it is obvious that a convention for the regulation of the conduct of war is intended by the parties to operate during war."[22]

34. Sir Gerald Fitzmaurice in his Hague Academy lectures in 1948 adopts a more or less similar position and concludes that the question of the survival of treaties is "one for decision in each case on the basis of the nature of the treaty and the intention of the parties regarding it".[23]

35. Various other reputable sources adopt the principle that it is the intention of the parties as formally expressed in the treaty which is the criterion. This is the position adopted by the Harvard Research Codification (1935),[24] by the American expert James J. Lenoir (an official of the Department of Justice giving his own opinion),[25] and a German expert, Richard Rank.[26]

36. It is now appropriate to look at the French and Swiss doctrine. The treatise of Guggenheim describes the legal position as follows:

> "An opinion held in the past, taking as a point of departure the notion that war, being an expression of complete anarchy in relations between States, is not susceptible to legal qualification of any kind, concludes from this that all treaties to which the belligerents are parties must be abrogated without exception and regardless of the number of parties. Contemporary diplomatic and judicial practice, however, admits of exceptions to this principle."[27]

This appears to accept the principle of abrogation as the consequence of the extralegal assumption that war lies outside the sphere of legal appreciation.

37. The position of Rousseau is very similar:

> "*Positing the problem*. At first sight, the dual notion that war is a complete rupture of international relations and that treaties represent the most finished form of such relations leads to the provisional conclusion that there is an incompatibility between a state of war and the very existence of international treaties. That, however, is a summary conclusion that needs to be nuanced: and in fact, practice shows that while some treaties are abrogated, others are only suspended and still others continue to remain in force. Hence, a complex situation that is difficult to categorize by using general formulations.

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[21] *British Year Book of International Law*, vol. 2 (1921-1922), p. 37 at pp. 39 and 40.

[22] McNair, *The Law of Treaties*, 1961, pp. 697 and 698. See also McNair, *Recueil des Cours*, Hague Academy of International Law, vol. 59 (1937), p. 527 at pp. 531 and 532.

[23] *Recueil des Cours*, Hague Academy of International Law, vol. 73 (1948, II, p. 301 at pp. 308-312).

[24] *American Journal of International Law*, vol. 29 (1935), Suppl. pp. 1183-1204.

[25] *Georgetown Law Journal*, vol. 34 (1945-1946), p. 129 at pp. 137 and 138.

[26] *Cornell Law Quarterly*, vol. 38 (1952-1953), pp. 321 at pp. 325-333.

[27] Guggenheim, *Traité*, vol. I, 1967, p. 241.

"On this issue, moreover, there is division as to the doctrine. Some authors (Cavaglieri) maintain that since the practice is very unsure, no rules apply in this matter. Others (McNair, Chailley) see the problem as one of interpreting the intention of the parties. Still other legal scholars (Anzilotti, Scelle) reject as stemming from an a priori system the notion that war as such could be a cause for the termination of treaties.

"Actually, war is not an internationally indifferent fact with respect to the validity of treaty rules. As does revolution within the internal constitutional order, the phenomenon of war presents itself as a method of abrogation that is abnormal, unpredictable, and extralegal in terms of positive law, with the qualification that while the principle of the nullifying effect of war is definite, there are nevertheless significant exceptions to this principle."[28]

38. Similar positions are adopted in the short expositions contained in the handbooks of Reuter, and of Daillier and Pellet.[29]

39. The reasoning in the French sources raises certain questions. In the first place, the main proposition (of *caducité*) appears to be based upon an extralegal premise concerning the nature of war. And yet, at the same time, the exceptions which are admitted depend upon intention or inferences of intention. Moreover, the French sources recognize the effect of express provisions according to which a treaty is to operate during an armed conflict. In doing so the doctrine is flawed by a contradiction. If war is an extralegal datum, why does it apply if only in part? It is also worth emphasizing that the extrajuridical thesis does not apply to the class of treaties prescribing obligations respecting the conduct of war.

40. The extrajuridical thesis should be set aside. Apart from the major contradictions noted above, such a thesis is alien to the spirit and substance of the Vienna Convention on the Law of Treaties. The reasons given by the Commission for leaving aside the topic of the effect of the outbreak of hostilities are unrelated to any thesis of the extralegal character of the subject.

41. The principle of intention does not receive much explicit support from the practice of States. However, as McNair demonstrates, much of the practice is compatible with such an approach.[30] The practice is to an extent in the form of treaties of peace which confirm, or revive, or terminate, pre-war treaties. Professors Daillier and Pellet adopt the position that the peace treaties of 1919 and 1947 confirm the principle of abrogation in the case of bilateral treaties.[31] Rousseau takes the same position.[32]

42. Other authorities take a more emollient view, as in the case of Briggs:

"The practice of confirming, reviving, or terminating pre-war treaties in treaties of peace, and the terminology employed, fail to provide clear evidence

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[28] Rousseau, *Droit international public*, vol. I, 1971, pp. 218-219, para. 195. For other French expositions of the post-war period see Sibert, *Traité de droit international public*, vol. II, 1951, pp. 347-358; and Cavaré, *Le droit international public positif*, 3rd ed. by Quéneudec, 1969, pp. 214-219.

[29] See Reuter, *Droit international public*, 6th ed. 1983, pp. 158 and 159; Daillier and Pellet, *Droit international public*, 6th ed., 1999, pp. 309-310, para. 200.

[30] See McNair, *The Law of Treaties*, 1961, pp. 702-710.

[31] Daillier and Pellet, *Droit international public*, 6th ed., 2002, p. 309.

[32] *Droit international public*, Tome I, 1970, pp. 221, para. 199.

of the existence of a rule of law concerning the effect of war on treaties other than of a right to suspend performance with regard to enemy States."[33]

43. It is probable that much of the practice of States takes the form of observations to the effect that the existence and nature of a general principle is the subject of doctrinal controversy.[34]

44. It is generally recognized that the municipal decisions are "not of great assistance".[35]

45. In the result the Special Rapporteur must present certain preliminary positions. There is no reason to classify the principle of abrogation, if this be the general principle, other than as a legal principle. The second question is whether the legal principle is an autonomous and general legal principle, with recognized exceptions, or something else. In the opinion of the Special Rapporteur, the principle is not in fact a general principle, being formulated exclusively in relation to bilateral treaties. Moreover, the principle is formulated as being subject to a number of substantial exceptions, which are themselves based essentially upon the object and purpose of the instrument.

46. In these circumstances, it is more logical, and more coherent, to formulate a general principle based upon the intention of the parties in respect of all types of treaty and this approach is represented in draft article 4.

47. In view of the elements of uncertainty in the sources, it is more than usually pertinent to refer to considerations of policy. The reliance upon intention appears to be justified, in the first place, by the fact that it maintains an appropriate relation with the law of treaties and the matrix constituted by the provisions of the Vienna Convention. The factor of intention conduces to the individualization of situations and avoids the imposition of "one fits all" solutions. Finally, the principle of intention promotes legal security and is effectively an application of the principle of *pacta sunt servanda* incorporated, as article 26, in the Vienna Convention: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

48. It is evident that the principle of intention will determine all the legal incidents of a treaty. In particular, it is intention which provides evidence both of the existence and the continued validity of a treaty, on the one hand, and its operation between the belligerents and between the belligerents and third States.

49. In accordance with the general principles of the law of treaties, the reliance upon the principle of intention is without prejudice to the termination or suspension of treaties as a consequence of: (a) the agreement of the parties; or (b) a material breach; or (c) supervening impossibility of performance; or (d) a fundamental change of circumstances.

50. Two further aspects of the subject need to be addressed. It is common for the writers to distinguish between relations between the parties to an armed conflict and

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[33] Briggs, *The Law of Nations*, 2nd ed., 1953, p. 943.

[34] See the *Répertoire suisse de droit international public*, I, 1975, Département politique fédéral, para 1.89, pp. 188-191 (dated 3 November 1931).

[35] See Professor Clive Parry in Sorensen (ed.), *Manual of Public International Law*, 1968, pp. 237 and 238. In the course of preparing the present report, such municipal decisions will naturally be taken into account, but there is no coherent pattern on which reliance could be placed.

relations with, or between, third States. Obviously, the distinction is significant, but it is submitted that it is only significant within the framework of the criterion of intention. It is this criterion which will determine relations between "belligerents" and "neutrals". Moreover the ambit of the concept of an armed conflict does not march comfortably with the dichotomy of belligerent and neutral.

51. A similar question arises when the distinction between bilateral and multilateral treaties is given prominence. The policy considerations involved have been described by Sir Cecil Hurst as follows:

> "Multilateral treaties with neutral parties must clearly stand on a different footing from treaties between parties all of whom have been engaged in the war. The recent world conflict presented for the first time on a large scale the problem of multilateral treaties all the parties to which were belligerents. There seems in theory no reason why such treaties should not stand on the same footing as bilateral treaties between the belligerents. On the other hand, where there are third parties who have been neutral in the war, the reciprocal rights and duties between each belligerent and the third party, and the difficulty of terminating such rights and duties between any two parties when they are to continue in force between other parties, render it probable that when the treaty was concluded the intention was that, as between belligerent parties, war should not put an end to the treaty, even though while actual hostilities continued it might be difficult, or even impossible, to give effect to it as between the belligerents.
>
> "The commonest class of cases of this kind is that of the general international conventions on such matters as postal or telegraphic correspondence, industrial property, sanitary matters, and so forth, but the principle would also cover multilateral conventions with a political object primarily affecting a neutral third party: e.g. the Convention of 1907 respecting the independence and integrity of Norway. Judging by its terms, the intention of that Convention was that it should constitute a kind of self-denying ordinance on the part of the Great Powers for the purpose of ensuring the integrity of a State which remained neutral during the late war. The language employed affords no reason for presuming that the parties intended, when they concluded that Convention, that if war broke out between them they should be freed from their obligations inter se any more than from their obligations towards the State which remained neutral.
>
> "On the whole it seems safe to state that the outbreak of war does not invalidate, as between the belligerents, a multilateral treaty to which States remaining neutral are parties, even though while hostilities last the treaty may be difficult or incapable of execution; but that a multilateral treaty all the parties to which are belligerents will stand on the same footing and be judged by the same tests as bilateral treaties between the belligerents."[36]

52. The key point is that the principle of intention provides the general criterion, whether or not bilateral or multilateral treaties are involved, or the relations between parties to an armed conflict exclusively, or the relations between parties to the conflict and third States.

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[36] *British Year Book of International Law*, vol. 2 (1921-1922) pp. 40 and 41.

53. The Vienna Convention provides the following rules on the interpretation of treaties, both bilateral and multilateral:

"*Article 31*
"*General rule of interpretation*

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

"2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

"(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

"(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

"3. There shall be taken into account, together with the context:

"(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

"(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

"(c) Any relevant rules of international law applicable in the relations between the parties.

"4. A special meaning shall be given to a term if it is established that the parties so intended.

"*Article 32*
"*Supplementary means of interpretation*

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

"(a) Leaves the meaning ambiguous or obscure; or

"(b) Leads to a result which is manifestly absurd or unreasonable."

54. Paragraph 2 (b) of draft article 4 is intended to incorporate the substance of paragraph (b) of draft article 2.

Draft article 5
Express provisions on the operation of treaties

1. Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

2. The outbreak of an armed conflict does not affect the competence of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.

Comment

55. The present draft article is in some sense superfluous but, against the historical background, and the former acceptance of a principle of abrogation, it has a certain role of clarification. In any event, a number of general treatises have found it useful to affirm the principle.[37] The Harvard Research Draft states the applicable principle as follows:

> "Art. 35(a). A treaty which expressly provides that the obligations stipulated are to be performed in time of war between two or more of the parties, or which by reason of its nature and purpose was manifestly intended by the parties to be operative in time of war between two or more of them, is not terminated or suspended by the beginning of a war between two or more of the parties."

56. The second paragraph is of some significance. As McNair has remarked: "There is no inherent juridical impossibility ... in the formation of treaty obligations between two opposing belligerents during the war".[38] Such agreements have been concluded in practice and a number of writers have referred to pertinent episodes. Echoing McNair to some extent, Sir Gerald Fitzmaurice observed in his Hague lectures:

> "Again, there is no inherent impossibility in treaties being actually concluded between two belligerents during the course of a war. This is indeed what happens when, for instance, an armistice agreement is concluded between belligerents. It also occurs when belligerents conclude special agreements for the exchange of personnel, or for the safe conduct of enemy personnel through their territory, and so on. These agreements may have to be concluded through the medium of a third neutral State or protecting power, but once concluded they are valid and binding international agreements."[39]

57. The principle, and its practical significance, is also recognized by Briggs (*The Law of Nations*, 2nd ed., 1953, p. 942) and by Aust (*Modern Treaty Law and Practice*, 2000, p. 233). Whiteman's *Digest* quotes the 1965 version of the American Law Institute Restatement of the Law Second, *Foreign Relations Law of the United States* (p. 482, sect. 157):

> "An international agreement that, either by express provision or by reason of its nature, is intended to be operative during hostilities is not affected by hostilities involving one or more parties to the agreement."[40]

58. The principle in the second paragraph is essentially linked to the provisions of draft article 4 and also reflects the principle of *pacta sunt servanda*.

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[37] See Rousseau, op. cit., Tome I, pp. 222 and 223, para. 200 (II); Institute of International Law, Resolution adopted on 28 August 1985, article 3.

[38] McNair, *The Law of Treaties*, 1961, p. 696.

[39] *Recueil des Cours*, Hague Academy of International Law, vol. 73 (1948, II), p. 309.

[40] Whiteman, *Digest of International Law*, vol. XIV, September 1970, p. 509.

Draft article 6
Treaties relating to the occasion for resort to armed conflict

A treaty, the status or interpretation of which is the subject matter of the issue which was the occasion for resort to armed conflict, is presumed not to be terminated by operation of law, but the presumption will be rendered inoperable by evidence of a contrary intention of the contracting parties.

Comment

59. Certain of the authorities hold the opinion that in cases in which an armed conflict is caused by differences as to the meaning or status of a treaty, the treaty may be presumed to be annulled.[41] The principle is explained by Hall in this way:

> "In all cases in which war is caused by differences as to the meaning of a treaty, the treaty must be taken to be annulled. During hostilities the right interpretation is at issue; and it would be pedantry to press the analogy between war and legal process so far as to regard the meaning ultimately sanctioned by victory as representing the continuing obligation of the original compact. Whether the point in dispute be settled at the peace by express stipulations, or whether the events of the war have been such as to render express stipulations unnecessary, a fresh starting-point is taken; a peace which, whether tacitly or in terms, gives effect to either of two interpretations has substituted certainty for doubt, and thus has brought a new state of things into existence."

60. This prescription, although supported by distinguished opinions, is questionable. No doubt during the currency of the armed conflict the performance of the treaty concerned would be suspended. In other contexts the principle is open to serious question.

61. As a matter of legal principle and sound policy, the supposition that a treaty forming an element in a dispute is a nullity, simply because it forms part of the "causes" of an armed conflict, is unacceptable. The practice of States confirms that, when a process of peaceful settlement is put in train, the treaty or treaties in question are not regarded as invalid or terminated on account of a connection with the armed conflict as such. Recent examples of such peaceful settlement include the Rann of Kutch case[42] and the awards of the Eritrea-Ethiopia Boundary Commission.[43]

Draft Article 7
The operation of treaties on the basis of necessary implication from their object and purpose

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

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[41] See Hall, op. cit., pp. 458 and 459; and Briggs, op. cit., p. 939.

[42] *International Law Reports*, vol. 50, p. 2, award dated 19 February 1968.

[43] *International Legal Materials*, vol. 41 (2002), p. 1057, award dated 14 April 2002.

2. Treaties of this character include the following:

(a) Treaties expressly applicable in case of an armed conflict;

(b) Treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

(c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

(d) Treaties for the protection of human rights;

(e) Treaties relating to the protection of the environment;

(f) Treaties relating to international watercourses and related installations and facilities;

(g) Multilateral law-making treaties;

(h) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(i) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

(j) Treaties relating to diplomatic relations;

(k) Treaties relating to consular relations.

Comment

62. The content of draft article 7 is, on a strict view, superfluous. The criterion of intention is, in principle, of general application and thus it is applicable by reference to all the relevant circumstances. However, a major aspect of the treatment in the literature is the indication of categories of treaties in order to identify types of treaty which are in principle not susceptible to suspension or termination in case of armed conflict. This approach is to be seen in Hall;[44] McNair;[45] Fitzmaurice;[46] Tobin;[47] Rousseau;[48] and Daillier and Pellet.[49] Rousseau formulates the general principle (*le principe de caducité*) and then presents a series of significant exceptions to the general principle. The study by the Secretariat employs a system of categorization and identifies "treaties exhibiting a very high likelihood of applicability", "treaties exhibiting a moderately high likelihood of applicability", "treaties exhibiting a varied or emerging likelihood of applicability", and "treaties exhibiting a low likelihood of applicability".[50]

63. The Special Rapporteur has employed only the one category of exceptions to the general principle, based upon the object and purpose of the treaty (cf. the references to "object and purpose" in the Vienna Convention on the Law of Treaties,

[44] *International Law*, 8th ed., 1924, pp. 453-459.
[45] *Law of Treaties*, 1961.
[46] Fitzmaurice, *Recueil des Cours*, vol. 73 (1948, II) pp. 312-317.
[47] Tobin, *The Termination of Multipartite Treaties*, 1933, *passim*.
[48] Rousseau, *Droit international public*, Tome I, 1970, pp. 222-224.
[49] Daillier and Pellet, *Droit international public*, 6th ed., 2003, pp. 309 and 310.
[50] Secretariat Memorandum, paras. 17-78.

articles 20 (2) and 31 (1)). The candidate exceptions offered are based upon the views of writers for the most part. The exceptions placed in the present report are not all recommended for inclusion and the policy has been to allow the Commission to examine the possibilities.

64. In the light of the available material, which is substantial, it is helpful to indicate the background in the sources. The sources, it is worth emphasizing, are not restricted to the doctrine.

65. The categories which appear most prominently in the sources will now be examined in the order adopted in paragraph 2 of draft article 7.

Treaties expressly applicable in case of an armed conflict

66. The sources inevitably recognize that treaties expressly applicable to the conduct of hostilities are not affected in case of an armed conflict. The British practice is described by Lord McNair as follows:

> "There is abundant evidence that treaties which in express terms purport to regulate the relations of the contracting parties during a war, including the actual conduct of warfare, remain in force during war and do not require revival after its termination.
>
> "There were in existence at the outbreak of the first World War a number of treaties (to which one or more neutral States were parties) the object of which was to regulate the conduct of hostilities, e.g., the Declaration of Paris of 1856, and certain of the Hague Conventions of 1899 and 1907. It was assumed that those were unaffected by the war and remained in force, and many decisions rendered by British and other prize courts turned upon them. Moreover, they were not specifically revived by or under the treaties of peace. Whether this legal result is attributable to the fact that the contracting parties comprised certain neutral States or to the character of the treaties as the source of general rules of law intended to operate during war is not clear, but it is believed that the latter was regarded as the correct view. If evidence is required that the Hague Conventions were considered by the United Kingdom Government to be in operation after the conclusion of peace, it is supplied by numerous references to them in the annual British lists of 'Accessions, Withdrawals, Etc.', published in the British Treaty Series during recent years, and by the British denunciation in 1925 of Hague Convention VI of 1907. Similarly in 1923 the United Kingdom Government, on being asked by a foreign Government whether it regarded the Geneva Red Cross Convention of 6 July 1906 as being still in force between the ex-Allied Powers and the ex-enemy Powers, replied that in the view of His Majesty's Government this convention, being of a class the object of which is to regulate the conduct of belligerents during war, was not affected by the outbreak of war."

67. This principle is accepted generally both in the doctrine and in the practice of States. In 1963 the General Counsel of the United States Department of Defense, referring to the application of the Nuclear Test Ban Treaty in time of war stated the following:[51]

> "It is my opinion, shared by the Legal Adviser of the Department of State, that the treaty cannot properly be so construed."

[51] Whiteman, *Digest of International Law*, vol. XIV, pp. 509 and 510.

He continued

> "... it should be noted that it is standard practice in treaties outlawing the use of specified weapons or actions in time of war for the treaties to state expressly that they apply in time of war, in order to prevent possible application of the rule that war may suspend or annul the operation of treaties between the warring parties. (Cf., *Karnuth v. United States*, 279 U.S. 231, 236-239; *Oppenheim's 'International Law'*, vol. II, 7th ed., pp. 302-306) See, e.g.:
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> "International Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg, 29 November, 11 December 1868);
>
> "International Declaration Respecting Asphyxiating Gases, Hague, 29 July 1899; International Declaration Respecting Expanding Bullets, The Hague, 29 July 1899;
>
> "International Convention Concerning the Laws and Customs of War on Land, The Hague, 18 October 1899;
>
> "Protocol for the Prohibition of the Use in War of Asphyxiating Gases, Poisonous, or other Gases, and of Bacteriological methods of Warfare, Geneva, 17 June 1925;
>
> "1949 Geneva Conventions on Wounded and Sick (art. 2); Prisoners of War (art. 2); Civilians (art. 2);
>
> "In the present case, language specifically prohibiting the use of nuclear weapons in wartime does not appear; it must, therefore, be presumed that no such prohibition would apply."

Treaties declaring, creating, or regulating permanent rights or a permanent regime or status

68. The doctrine ranging over several generations recognizes that treaties declaring, creating, or regulating permanent rights or a permanent regime or status are not suspended or terminated in case of an armed conflict. The writers concerned include Hall,[52] Hurst,[53] Oppenheim,[54] Fitzmaurice,[55] McNair,[56] Rousseau,[57] Guggenheim,[58] Daillier and Pellet,[59] Aust,[60] Tobin,[61] Delbrück,[62] Stone[63] and Gialdino.[64]

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[52] Hall, *International Law*, 8th ed., 1924, pp. 456 and 457.
[53] Hurst, *British Year Book of International Law*, vol. 2 (1921-1922), p. 46.
[54] Oppenheim, *International Law*, vol. II, 7th ed., 1948, p. 304.
[55] Fitzmaurice, *Recueil des Cours*, vol. 73 (1948, II), pp. 312 and 313.
[56] McNair, *Law of Treaties*, 1961, pp. 704-710 and 720.
[57] Rousseau, *Droit international public*, Tome I, 1970, p. 223.
[58] Guggenheim, *Traite de droit international public*, Tome I, 1967, pp. 241 and 242.
[59] Daillier and Pellet, *Droit international public*, 6th ed., 2003, p. 309.
[60] Aust, *Modern Treaty Law and Practice*, 2000, p. 244.
[61] Tobin, *The Termination of Multipartite Treaties*, 1933, pp. 50-69.
[62] Delbrück, "War Effect on Treaties", in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4, 2000, p. 1370.
[63] Stone, *Legal Controls of International Conflict*, revised edition, 1959, p. 448.
[64] *Gli Effetti della Guerra sui Trattati*, 1959, pp. 240 and 245.

69. The types of agreement involved include cessions of territory, treaties of union, treaties neutralizing part of the territory of a State, treaties creating or modifying boundaries, the creation of exceptional rights of user or access in respect of the territory of a State.

70. This category of treaties and the legal consequences attached to this categorization are recognized by an impressive number of authorities. Moreover, there is a certain amount of State practice supporting the position that such agreements are unaffected by the incidence of armed conflict. McNair describes the relevant British practice,[65] and Tobin asserts that the practice is generally compatible with the view adopted in the doctrine.[66]

71. In the North Atlantic Coast Fisheries Arbitration the British Government contended that rights of the United States in respect of fisheries, by virtue of the Treaty of 1783, had been abrogated as a consequence of the war of 1812. The Court did not share this view and stated that: "International law in its modern development recognizes that a great number of treaty obligations are not annulled by war, but at most suspended by it."[67]

72. The resort to this category does, however, generate certain problems. In particular, treaties of cession and other treaties effecting permanent territorial dispositions create permanent rights. As Hurst points out: "It is the acquired rights which flow from the treaties which are permanent, not the treaties themselves."[68] Consequently, if such treaties are executed, they cannot be affected by a subsequent armed conflict between the parties.

73. A further source of difficulty derives from the fact that the limits of the category are to some extent uncertain. Three areas of activity come into question. The first is the use of treaties of guarantee. This is an extensive subject[69] and it is clear that the effect of an armed conflict will depend upon the precise object and purpose of the treaty of guarantee. Treaties intended to guarantee a permanent state of affairs, such as the permanent neutralisation of a territory, will not be terminated by an armed conflict. Thus, as McNair observes, "the treaties creating and guaranteeing the permanent neutralisation of Switzerland or Belgium or Luxembourg are certainly political but they were not abrogated by the outbreak of war because it is clear that their object was to create a permanent system or status".[70]

74. A number of writers would include agreements relating to the grant of reciprocal rights to nationals and acquisition of nationality within the category of treaties creating permanent rights or a permanent status. However, the considerations leading to the treatment of such agreements as not susceptible to termination are to be differentiated to a certain extent from treaties concerning

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[65] McNair, *Law of Treaties*, 1961, pp. 704-715.

[66] Tobin, *The Termination of Multipartite Treaties*, 1933, pp. 137 et seq.

[67] Reports of International Arbitration Awards, vol. XI, p. 167; award dated 7 September 1910, at p. 181. See also Parry, *British Digest*, vol. 2B, 1967, pp. 585-605.

[68] Hurst, *British Year Book of International Law*, vol. 2 (1921-1922), p. 46. See also Fitzmaurice, *Recueil des Cours*, vol. 73 (1948, II), pp. 313, 314 and 317.

[69] See Verzijl, *International Law in Historical Perspective*, VI, 1973, pp. 457-459; Tobin, *The Termination of Multipartite Treaties*, 1933, pp. 55-69; Ress, Bernhardt (ed.), *Encyclopedia*, vol. 2, pp. 934-937; McNair, *Law of Treaties*, 1961, pp. 239-254.

[70] McNair, op. cit., p. 703.

cessions of territory and boundaries. Accordingly such agreements will be more appropriately associated with the wider class of friendship, commerce and navigation treaties and other agreements concerning private rights. This class of treaties is examined below.

Treaties of friendship, commerce and navigation and analogous agreements concerning private rights

75. Such treaties form a very important class of international transactions and form the precursors of the more recent bilateral investment treaties. The nomenclature is varied and such treaties are often denominated treaties of establishment or treaties of amity. They should not be confused with ordinary commercial treaties. A respectable consortium of writers refers to treaties of friendship, commerce and navigation (or establishment) as treaties which are not terminated as the result of armed conflict. The writers include Hurst,[71] Tobin,[72] McNair,[73] Fitzmaurice,[74] and Verzijl.[75] The category is also employed in the Secretariat Memorandum.[76]

76. This class of treaties includes other treaties concerned with the grant of reciprocal rights to nationals resident on the territory of the respective parties, including rights of acquisition of property, rights of transfer of such property and rights to acquire it by inheritance.[77] Associated with the class are agreements concerning the acquisition and loss of nationality, and other matters of status including marriage and guardianship.[78]

77. The policy basis for according a special status to this category of treaties is essentially that of legal security for the nationals and other private interests involved, coupled with the condition of reciprocity. In other words, there is no compelling reason why the incidence of an armed conflict should dislodge the mutually beneficial status quo. It is therefore not surprising that there is a quantity of State practice confirming the position that such treaties are not terminated in case of an armed conflict.

78. In 1931 the Government of Switzerland, that is to say the Federal Government of Justice and Police, did not accept that treaties of establishment and commerce could be abrogated or suspended as between a belligerent and a neutral State.[79] The position of the British Government was opposed to the Swiss position in the pertinent negotiations. However, the practice of the United States was influenced by

[71] Hurst, *British Year Book of International Law*, vol. 2 (1921-1922), pp. 43 and 44.

[72] Tobin, *The Termination of Multipartite Treaties*, 1933, pp. 82-87.

[73] McNair, *Law of Treaties*, 1961, pp. 713-715, 718 and 719.

[74] Fitzmaurice, *Recueil des Cours*, vol. 73 (1948, II), pp. 314 and 315.

[75] Verzijl, *International Law in a Historical Perspective*, VI, 1973, pp. 382-385.

[76] Secretariat Memorandum, pp. 54-58.

[77] See McNair, *Law of Treaties*, 1961, p. 711; Fitzmaurice, *Recueil des Cours*, vol. 73 (1948, II), p. 315; Verzijl, *International Law in a Historical Perspective*, VI, pp. 382-385; Secretariat Memorandum, paras. 37-46, 67 and 76; Oppenheim, *International Law*, vol. II, 7th ed., 1948, p. 304.

[78] See McNair, op. cit., p. 714; and Verzijl, op. cit., p. 385.

[79] *Répertoire suisse de droit international public*, pp. 188-191.

certain judicial decisions. The change in United States practice is reflected in Whiteman's *Digest*. Of particular interest is the following material:[80]

> "In connection with litigation involving decedants' estates in which the Alien Property Custodian had vested the interests of German nationals, Attorney General Biddle inquired in 1945 whether the Department of State concurred with the position being advanced by the Department of Justice that the provisions of articles I and IV of the Treaty of Friendship, Commerce and Consular Rights of 8 December 1923, with Germany (United States Treaty Series 725; 44 United States Statutes at Large 2132; 52, League of Nations Treaty Series, 133) had not been abrogated by the war but were still effective. In Acting Secretary of State Grew's reply of 21 May 1945, to the Attorney General, it was stated:
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> > 'Article I of the Treaty covers a broad field, conferring upon nationals of each High Contracting Party the right to enter and sojourn in the territories of the other, to carry on specified types of occupations, to own or lease buildings and lease land, and to enjoy freedom from discrimination in taxes, freedom of access to the courts, and protection for their persons and property. Article IV relates to the disposition and inheritance of real and personal property.
> >
> > 'It appears that the law with respect to the effect of war upon treaties is by no means clear or well settled ... [Here follow references to and quotations from the cases *Karnuth v. United States*, 279 United States 231, 236 (1929), *Techt v. Hughes*, 229 New York 222, 240 (1920), 128 N.E. 185, 191 (1920), certiorari denied 254 United States 643 (1920), and the Sophie Rickmers, 45 Fed. 2d 413 (S.D.N.Y. 1930).]
>
> "...
>
> > 'Applying the principles of these decisions to article I of the Treaty of 1923 with Germany, there would appear to be considerable doubt as to the present effectiveness of some of the provisions of that article, such as those with respect to entry into the United States, the right to engage in certain occupations, etc. On the other hand, there would seem to be no reason to regard article IV as not continuing to be operative despite the outbreak of war.
> >
> > 'A provision in a treaty with Austria-Hungary similar to article IV was held effective during war time in *Techt v. Hughes*, supra, ...
> >
> > 'This case was followed in *State ex rel. Miner v. Reardon* [120 Kans. 614, 245, Pac. 158 (1926)] ... The Supreme Court of Nebraska came to the same conclusion in *Goos v. Brocks* [117 Neb. 750 (1929), 223 N.W. 13 (1929)], ...
> >
> > 'While the treaty provision in the instant case is somewhat different from that in the *Karnuth* case, it should be noted that in the latter case the Supreme Court said that "there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: ... provisions giving the right to citizens or subjects of one of the high

[80] Whiteman, *Digest of International Law*, vol. XIV, pp. 495-497.

contracting powers to continue to hold and transmit land in the territory of the other" ...

'Although Secretary of State Lansing wrote on 10 September 1918 that the Department did not regard such treaty provisions with respect to the disposition and inheritance of real property as in force during the war with Germany and Austria-Hungary ... that statement was made prior to the judicial decisions discussed herein and before the approach represented by those decisions had been so clearly adopted by the courts. There appears to be a trend toward recognising greater continuing effectiveness of treaty provisions during war than in earlier times. It is believed that Secretary Lansing's statement does not represent the view which would now be held.

'It may be observed that the courts of this country appear to have taken a position somewhat more favourable to the continuing effectiveness of treaty provisions in time of war than have many of the writers on international law. Among modern writers there appears to be a trend in favour of the view that "the element on which must depend an answer to the question whether or not a particular treaty is or is not abrogated by the outbreak of war between the parties, is to be found in the intention of the parties at the time when they concluded the treaty, rather than in the nature of the treaty provision itself." (Sir Cecil Hurst, 'The Effect of War on Treaties', 1921-1922 *British Year Book of International Law*, 37, 47.) See also C. C. Hyde, *International Law* (2nd ed., 1945) vol. II, pp. 1546 et seq; Harvard Research in International Law, *Law of Treaties*, 29 *American Journal of International Law* Supp. (1953), 1183 et seq. There does not appear to be any evidence as to the actual intention in this respect at the time when the treaty with Germany was concluded in 1923. However, in view of the then recent decision in *Techt v. Hughes*, supra, it would not be unreasonable to suppose that such a provision as article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war.

'In the light of the foregoing the Department perceives no objection to the position which you are advancing to the effect that article IV of the Treaty of 8 December 1923, with Germany remains in effect despite the outbreak of war.'

"The Acting Secretary of State (Grew) to the Attorney General (Biddle), letter, 21 May 1945, MS. Department of State, file 740.00113 EW/4-1245."

79. In 1948 the position adopted was confirmed by the Acting Legal Adviser, Jack B. Tate. In his words:[81]

"In a letter dated 21 May 1945 from the Acting Secretary of State to the Attorney-General, the Department of State set forth its views regarding the continuation in effect of article IV of the above-mentioned treaty despite the outbreak of war. In the case of *Clark v. Allen* (1947), 91 L. Ed. 1633, 1641-1643, the Supreme Court decided that the provisions of article IV of the 1923 treaty with Germany relating to the acquisition, disposition and taxation of

[81] Whiteman, *Digest of International Law*, vol. XIV, pp. 502 and 503, letter dated 10 November 1948, to the Attorney-General.

property remained effective during the war. The Department observes that customarily, as indicated by the decision in *Clark v. Allen* and a number of other decisions of the United States Supreme Court, the determinative factor is whether or not there is such an incompatibility between the treaty provision in question and the maintenance of a state of war as to make it clear that the provision should not enforced.

"In connection with the property acquired in San Francisco by the German Government in 1941 for consular purposes, the relevant provisions of the 1923 treaty with Germany are those of the second paragraph of article XIX ... The Department of State is of the view that the legal effect of these provisions was unchanged by the outbreak of war between the United States and Germany. This view is in complete accord with the policy long followed by this Government, both in time of peace and in time of war, with regard to property belonging to the Government of one country and situated within the territory of another country. This Government has consistently endeavoured to extend to the property of other Governments situated in territory under the jurisdiction of the United States of America the recognition normally accorded such property under international practice and to observe faithfully any rights guaranteed such property by treaty. This Government, likewise, has been equally diligent in demanding that other governments accord such recognition and rights to its property in their territories.

"The history of this Government's treatment of the German diplomatic and consular properties in the United States following the outbreak of war between the United States and Germany may be of interest in connection with this matter.

" ...

"In view of these considerations, the Department of State perceives no objection to the position which the Office of Alien Property is advancing that the provisions of the second paragraph of article XIX of the treaty signed 8 December 1923 with Germany remain in effect despite the outbreak of war between the United States and Germany."

[The Acting Legal Adviser (Tate) to the Attorney-General (Clark), letter, 10 November 1948, MS. Department of State, file 711.622/9-1648.]

80. This view is reflected in the decisions of municipal courts in several States, but the jurisprudence is by no means consistent.[82]

81. The jurisprudence of the International Court of Justice concerning similar treaty provisions is not inimical to the legal positions presented above. However, the Court did not address the issue of the effects of armed conflict on validity or suspension in the Nicaragua case.[83] Moreover, the Court did not make any finding on the question of the existence or not of an "armed conflict" between the parties.[84]

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[82] Rank, *Cornell Law Quarterly*, vol. 38 (1952-53), pp. 511-533; Whiteman, *Digest of International Law* XIV, September 1970, pp. 497-505; Verzijl, *International Law in a Historical Perspective*, VI, 1973, pp. 377-385.

[83] ICJ Reports, 1984, p. 393 at pp. 426-429.

[84] Secretariat Memorandum, paras. 69-74.

It is to be recalled that the United States still maintained diplomatic relations with Nicaragua, and there had been no declaration of war or of an armed conflict.

82. The decision of the Court in the Oil Platforms case[85] also rested upon the assumption that the Treaty of Amity, Economic Relations, and Consular Rights of 1955, remained in force. The relevance of these decisions is affected by the fact that the Treaty of Amity had remained in force.[86] This had not been contested by the parties.

83. In addition, it is safe to assume that the present class of treaties include bilateral investment treaties. As Aust points out, the purpose of such agreements is the mutual protection of nationals of the parties.[87]

Treaties for the protection of human rights

84. The literature makes very few references to the status for present purposes of treaties for the protection of human rights. This state of affairs is in fact readily explicable. Much of the relevant literature is earlier than the emergence of human rights norms in the era of the Charter of the United Nations. Furthermore, the specialist literature on human rights has a tendency to neglect the more technical problems. The resolution of the Institute of International Law adopted in 1985 included the following provision (in article 4):

> "The existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides."

Article 4 was adopted by 36 votes to none, with 2 abstentions.[88]

85. The use of the category of human rights protection may be seen as a natural extension of the status accorded to treaties of friendship, commerce and navigation and analogous agreements concerning private rights, including bilateral investment treaties. There is also a close relation to the treaties creating a territorial regime and, in so doing, setting up standards governing the human rights of the population as a whole, or a regime for minorities, or a regime for local autonomy.

86. The application of human rights treaties in time of armed conflict is described in the Secretariat Memorandum[89] as follows:

> "Although the debate continues whether human rights treaties apply to armed conflict, it is well established that non-derogable provisions of human rights treaties apply during armed conflict. First, the International Court of Justice stated in its Nuclear Weapons advisory opinion that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. The Nuclear Weapons opinion is the closest that the Court has come to examining the effects of armed conflict on treaties, including significant discussion of the

[85] Judgment of 6 November 2003. See also the judgment on *Case Concerning Oil Platforms* (Preliminary Objection), ICJ Reports, 1996, p. 803.

[86] See the judgment on the preliminary objection, ICJ Reports, 1996, p. 809, para. 15.

[87] See Aust, *Modern Treaty Law and Practice*, 2000, p. 244.

[88] *Annuaire de l'Institut de droit international*, vol. 61 (II), pp. 219-221.

[89] Secretariat Memorandum, para. 33 (footnotes omitted).

effect of armed conflict on both human rights and environmental treaties. Second, the International Law Commission stated in its commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts that although the inherent right to self-defence may justify non-performance of certain treaties, 'as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.' Finally, commentators are also in agreement that non-derogable human rights provisions are applicable during armed conflict. Because non-derogable human rights provisions codify *jus cogens* norms, the application of non-derogable human rights provisions during armed conflict can be considered a corollary of the rule expressed in the previous section that treaty provisions representing *jus cogens* norms must be honoured notwithstanding the outbreak of armed conflict."

87. This description illustrates the problems relating to the applicability of human rights standards in case of armed conflict.[90] The task of the Commission is not to enter upon such matters of substance but to direct attention to the question of the effects of armed conflict upon the operation or validity of particular treaties. In this connection, the test of derogability is not appropriate, because derogability concerns the operation of the provisions and is not related to the issue of validity or termination. However, the competence to derogate "in time of war or other public emergency threatening the life of the nation" certainly provides evidence that an armed conflict as such does not result in suspension or termination. At the end of the day the appropriate criterion is the intention of the parties. The exercise (or not) of a competence to derogate would not prevent another party to the treaty asserting that a suspension or termination was justified *ab extra*.

Treaties relating to the protection of the environment

88. The Special Rapporteur has decided that the Commission should be asked to examine the candidature of this category of treaties. Most environmental treaties do not contain express provisions on their applicability in case of armed conflict. The subject matter and modalities of treaties for the protection of the environment are extremely varied.[91] The only general principle is that of the intention of the parties.

89. The pleadings relating to the Advisory Opinion of the International Court of Justice on nuclear weapons indicate, quite clearly, that there is no general agreement on the proposition that all environmental treaties apply both in peace and in time of armed conflict, subject to express provisions indicating the contrary.[92] In all the circumstances the Special Rapporteur does not consider that there is a strong case for reliance upon this category of treaties as a guide to the intention of the parties.

90. In the nuclear weapons Advisory Opinion the International Court formulated the general legal position in these terms:[93]

"29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment.

[90] See, further, Prévost, *International Human Rights and Humanitarian Law*, 2002.

[91] Sands, *Principles of International Environmental Law*, 2nd ed., 2003, pp. 307-316; Birnie and Boyle, *International Law and the Environment*, 2002, pp. 148-151; Mollard-Bannelier, La Protection de l'environnement en temps de conflit armé, 2001.

[92] See the Secretariat Memorandum, paras. 58-63.

The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

"30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

"The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

"This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

> 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.'

"31. The Court notes furthermore that articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

"These are powerful constraints for all the States having subscribed to these provisions."

91. These prescriptions are, of course, significant and they provide general and indirect support for the use of a presumption that environmental treaties apply in case of armed conflict. However, as the written submissions in the Advisory Opinion proceedings indicate, there was no consensus on the specific legal question.[94]

Treaties relating to international watercourses and related installations and facilities

92. Treaties relating to watercourses or rights of navigation are essentially a subset of the category of treaties creating or regulating permanent rights or a permanent

[93] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 241 and 242.

[94] See Akande, *British Year Book of International Law*, vol. 68 (1997), pp. 183 and 184.

regime or status. It is, nonetheless, convenient to examine this group separately. A number of authorities recognize this type of instrument as being unqualified for termination in time of an armed conflict. Such writers include Tobin,[95] McNair,[96] Fitzmaurice,[97] Rank,[98] Chinkin,[99] and Delbrück.[100]

93. The picture is, however, far from simple. The practice of States has been described as follows by Fitzmaurice:[101]

> "Where all the parties to a convention, whatever its nature, are belligerents, the matter falls to be decided in much the same way as if the convention were a bilateral one. For instance, the class of law-making treaties, or of conventions intended to create permanent settlements, such as conventions providing for the free navigation of certain canals or waterways or for freedom and equality of commerce in colonial areas, will not be affected by the fact that a war has broken out involving all the parties. Their operation may be partially suspended but they continue in existence and their operation automatically revives on the restoration of peace."

94. The application of treaties concerning the status of certain waterways may be subject to the exercise of the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations.[102]

95. In any event, the regime of individual straits and canals is usually dealt with by means of specific provisions. The examples of such treaties include the Convention Instituting the Statute of Navigation of the Elbe (1922),[103] the provisions of the Treaty of Versailles relating to the Kiel Canal (1919),[104] the Convention regarding the Regime of the Straits (Montreux) (1936),[105] the Panama Canal Treaty (1977)[106] and the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal (1977).[107] There is also the question of the relation of such instruments to the principles of customary law.[108] The effects of an armed conflict on these instruments is governed primarily by the criterion of intention and, for a number of cogent reasons of policy, the Special Rapporteur does not intend to encourage the Commission to suggest detailed studies.

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[95] Tobin, *The Termination of Multipartite Treaties*, 1933, pp. 89-95.

[96] McNair, *Law of Treaties*, 1961, p. 720.

[97] Fitzmaurice, *Recueil des Cours*, vol. 73 (1948, II), pp. 316 and 317.

[98] Rank, *Cornell Law Quarterly*, vol. 38 (1952-1953), pp. 326 and 327.

[99] Chinkin, *Yale Journal of World Public Order*, vol. 7 (1980-81), pp. 202-205.

[100] Delbrück, "War Effect on Treaties", in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4, 2000, p. 1370.

[101] Fitzmaurice, op. cit., p. 316.

[102] See Baxter, *The Law of International Waterways*, 1964, p. 205.

[103] 26 *League of Nations Treaty Series* 221, 241.

[104] 112 *British and Foreign State Papers* (1919).

[105] 173 *League of Nations Treaty Series* 213.

[106] *International Legal Materials* (1977), p. 1022.

[107] Ibid., p. 1040.

[108] See generally Baxter, op. cit., and Chinkin, op. cit. See also the judgement of the Permanent Court in *The S.S. Wimbledon*, 1923, Permanent Court of International Justice, Series A, No. 1. Further citations may be found in the Secretariat Memorandum, paras. 56 and 57; and in Rank, op. cit., pp. 325-329.

96. Certain multilateral agreements provide expressly for a right of suspension in time of war. Thus article 15 of the Statute on the Regime of Navigable Waterways of International Concern (1922)[109] provides that:

> "This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit."

97. The Convention on the Law of the Non-navigational Uses of International Watercourses (1997)[110] provides as follows in article 29:

> "*International watercourses and installations in time of armed conflict*
>
> "International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules."

98. There is a certain case for including the present category in draft article 7, but it is not a very strong case. In particular, it is not clear that there is a necessary implication from the object and purpose of such treaties that no effect ensues from an armed conflict, particularly when this affects the riparian State. The circumstances of each waterway vary considerably and much will depend upon the intensity of the armed conflict concerned. It remains for the Commission to decide on the question of whether this class of treaty should be accorded a special status.

Multilateral law-making treaties

99. The category of law-making treaties is defined by McNair as follows:[111]

> "(i) *Multi-partite law-making treaties*
>
> By these are meant treaties which create rules of international law for regulating the future conduct of the parties without creating an international regime, status, or system. It is believed that these treaties survive a war, whether all the contracting parties or only some of them are belligerent. The intention to create permanent law can usually be inferred in the case of these treaties. Instances are not numerous. The Declaration of Paris of 1856 is one; its content makes it clear that the parties intended it to regulate their conduct during a war, but it is submitted that the reason why it continues in existence after a war is that the parties intended by it to create permanent rules of law. Hague Convention II of 1907 for the Limitation of the Employment of Force for the Recovery of Contract Debts and the Peace Pact of Paris of 1928 are also instances of this type. Conventions creating rules as to nationality, marriage, divorce, reciprocal enforcement of judgements, etc., would probably belong to the same category."

[109] 7 *League of Nations Treaty Series* 37, 61.

[110] *International Legal Materials*, vol. 36 (1977), 700.

[111] McNair, *Law of Treaties*, 1961, p. 723.

100. The significance of this category is indicated in several other authorities, including Rousseau,[112] Fitzmaurice,[113] Starke,[114] Delbrück[115] and Gialdino.[116] The category is also given prominence in the Secretariat Memorandum.[117]

101. There is a certain amount of State practice relating to multilateral treaties of a technical character arising from the post-war arrangements resulting from the Second World War. Fitzmaurice, who was part of the Foreign Office legal department, discusses the way in which the revival or otherwise of bilateral treaties was dealt with, which involved a method of notification. Fitzmaurice then continues:[118]

> "The merit of a provision of this kind is that it settles beyond possibility of doubt the position in regard to each bilateral treaty which was in force at the outbreak of war between the former enemy States and any of the Allied or Associated Powers, which would certainly not be the case in the absence of such a provision, having regard to the considerable difficulty and confusion which surrounds the subject of the effect of war on treaties, particularly bilateral treaties.
>
> "This difficulty also exists in regard to multilateral treaties and conventions, but it is much less serious, as it is usually fairly obvious on the face of the multilateral treaty or convention concerned what the effect of the outbreak of war will have been on it. In consequence, and having regard to the great number of multilateral conventions to which the former enemies and the Allied and Associated Powers were parties (together with a number of other States, some of them neutral or otherwise not participating in the peace settlement) and of the difficulty that there would have been in framing detailed provisions about all these conventions, it was decided to say nothing about them in the peace treaties and to leave the matter to rest on the basic rules of international law governing it. It is, however, of interest to note that when the subject was under discussion in the Juridical Commission of the Peace Conference, the view of the Commission was formally placed on record and inscribed in the minutes that, in general, multilateral conventions between belligerents, particularly those of a technical character, are not affected by the outbreak of war as regards their existence and continued validity, although it may be impossible for the period of the war to apply them as between belligerents, or even in certain cases as between belligerents and neutrals who may be cut off from each other by the line of war; but that such conventions are at the most suspended in their operation and automatically revive upon the restoration of peace without the necessity of any special provision to that effect. The matter is actually not quite so simple as that, even in relation to multilateral conventions, but at any rate that was broadly the basis upon which it was decided not to make any express provision about the matter in the peace treaties."

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[112] Rousseau, *Droit international public*, Tome I, 1970, pp. 223 and 224.

[113] Fitzmaurice, *Recueil des Cours*, vol. 73 (1948, II), pp. 308, 309 and 313.

[114] *Starke's International Law*, 11th ed., by Shearer, 1994, p. 493.

[115] Delbrück, Bernhardt (ed.), *Encyclopedia*, Vol. 4, 2000, p. 1370.

[116] Gialdino, *Gli Effetti della Guerra Sui Trattati*, 1959, pp. 225-239.

[117] Secretariat Memorandum, paras. 47-51.

[118] Fitzmaurice, *Recueil des Cours*, vol. 73 (1948, II), pp. 308-309. See also Oppenheim, *International Law*, vol. II, 7th ed., 1948, pp. 304-306.

102. The United States position is described in a letter dated 29 January 1948 from the State Department Legal Adviser, Ernest A. Gross:[119]

> "With respect to multilateral treaties of the type referred to in your letter, however, this Government considers that, in general, non-political multilateral treaties to which the United States was a party when the United States became a belligerent in the war, and which this Government has not since denounced in accordance with the terms thereof, are still in force in respect of the United States and that the existence of a state of war between some of the parties to such treaties did not ipso facto abrogate them, although it is realised that, as a practical matter, certain of the provisions might have been inoperative. The view of this Government is that the effect of the war on such treaties was only to terminate or suspend their execution as between opposing belligerents, and that, in the absence of special reasons for a contrary view, they remained in force between co-belligerents, between belligerents and neutral parties, and between neutral parties.
>
> "It is considered by this Government that, with the coming into force on 15 September 1947 of the treaty of peace with Italy, the non-political multilateral treaties which were in force between the United States and Italy at the time a state of war commenced between the two countries, and which neither government has since denounced in accordance with the terms thereof, are now in force and again in operation as between the United States and Italy. A similar position has been adopted by the United States Government regarding Bulgaria, Hungary, and Rumania ..."

103. The British position was reported in a letter form the Foreign Office dated 7 January 1948 as follows:[120]

> "I am replying ... to your letter ... in which you enquired about the legal status of multilateral treaties of a technical or non-political nature, and whether these are regarded by His Majesty's Government in the United Kingdom as having been terminated by war, or merely suspended.
>
> "You will observe that, in the peace treaties with Italy, Finland, Roumania, Bulgaria and Hungary, no mention is made of such treaties, the view being taken at the Peace Conference that no provision regarding them was necessary, inasmuch as, according to international law, such treaties were in principle simply suspended as between the belligerents for the duration of the war, and revived automatically with the peace. It is not the view of His Majesty's Government that multilateral conventions ipso facto should lapse with the outbreak of war, and this is particularly true in the case of conventions to which neutral Powers are parties. Obvious examples of such conventions are the International Air Navigation Convention of 1919 and various postal and telegraphic conventions. Indeed, the true legal doctrine would appear to be that it is only the suspension of normal peaceful relations between belligerents which renders impossible the fulfilment of multilateral conventions in so far as concerns them, and operates as a temporary suspension as between the belligerents of such conventions. In some cases, however, such as the Red Cross Convention, the multilateral convention is especially designed to deal

[119] See Rank, *Cornell Law Quarterly*, vol. 38 (1952-1953), p. 343.
[120] Ibid., p. 346.

with the relations of Powers at war, and clearly such a convention would continue in force and not be suspended.

"As regards multilateral conventions to which only the belligerents are parties, if these are of a non-political and technical nature, the view upon which His Majesty's Government would probably act is that they would be suspended during the war, but would thereafter revive automatically unless specifically terminated. This case, however, has not yet arisen in practice."

104. The position of the German,[121] Italian,[122] and Swiss[123] Governments appears to be essentially similar in relation to the present subject matter. However, the State practice is not entirely consistent and further evidence of practice and, especially more current practice, is needed.

105. The decisions of municipal courts must be regarded as a problematical source. In the first place, it is common for decisions to depend upon the explicit guidance of the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. At the least it can be said that the municipal jurisprudence is not inimical to the principle of survival.[124] The general principle was supported in the decision of the Scottish Court of Session in *Masinimport v. Scottish Mechanical Light Industries Ltd.* (1976).[125]

106. Although the sources are not all congruent, the category of law-making treaties can be recommended for recognition as a class of treaties having the status of survival. As a matter of principle they should qualify and there is a not inconsiderable quantity of State practice favourable to the principle of survival.

Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice

107. This category is not prominent in the literature and is probably assumed to be merged to some extent in the category of multilateral treaties constituting an international regime. Certain writers, however, give explicit recognition of the continuing validity of treaties constituting machinery for the peaceful settlement of international disputes.[126] In accordance with this principle, special agreements concluded before the First World War were acted upon to effect the arbitrations concerned after the war.

Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards

108. As a matter of principle and sound policy the principle of survival must apply to obligations arising under multilateral conventions concerning arbitration and the

[121] Ibid., pp. 349-354.

[122] Ibid., pp. 347 and 348.

[123] See *Répertoire suisse de droit international public*, pp. 186-191.

[124] Rank, op. cit., pp. 511 and 533, Verzijl, *International Law in Historical Perspective*, VI, pp. 387-391.

[125] *International Law Reports*, vol. 74, p. 559 at p. 564.

[126] See McIntyre, *Legal Effect of World War II on Treaties of the United States*, 1958, pp. 74-86; and McNair, *The Law of Treaties*, 1961, p. 720. See also Hudson, *The Permanent Court of International Justice, 1920-1942*, 1943.

enforcement of awards. In *Masinimport v Scottish Mechanical Light Industries Ltd.*, the Scottish Court of Session held that such treaties had survived the Second World War and were not covered by the Romanian Peace Treaty of 1947.[127] The agreements concerned were the Protocol on Arbitration Clauses signed on 24 September 1923 and the Convention on the Execution of Foreign Arbitral Awards dated 26 September 1927. The Court classified the instruments as "multipartite law-making treaties". In 1971 the Italian Court of Cassation (Joint Session) held that the 1923 Convention on Commercial Arbitration Clauses remained valid in spite of the Italian declaration of war on France, its operation having only been suspended pending cessation of the state of war.[128]

109. The recognition of this family of treaties would seem to be justified and there are also links with other classes of treaty, including multilateral law-making treaties.

110. There is a significant analogy with the question of the effect of an outbreak of hostilities upon a clause providing for arbitration under the rules of the International Chamber of Commerce. In the case of *Dalmia Cement Ltd. v National Bank of Pakistan* the Sole Arbitrator, Professor Pierre Lalive, referring to the hostilities which took place between India and Pakistan in September 1965, made the following determination:[129]

> "68. To conclude, there is no doubt in my mind that, when the Claimant filed with the Court of Arbitration of the ICC a request for arbitration, there was in existence between the parties a valid and binding agreement to arbitrate under the ICC rules, even assuming that there had been a state of war between India and Pakistan. It is unnecessary to examine, then, whether submitting to arbitration does involve 'intercourse' with an 'enemy' and whether the authorities quoted to support this contention are relevant only to 'English' or local arbitrations but also to international arbitrations under the ICC rules. It would be equally superfluous to discuss the question whether the parties did, or could contemplate, when accepting the arbitration clause, the possibility that a 'state of war' or of an armed conflict short of war could or would arise between Pakistan and India.
>
> "For these reasons,
>
> "The undersigned Arbitrator
>
> "Finds that the arbitration proceedings instituted by the Claimant come within the competence of the Arbitration Court of the International Chamber of Commerce and that the Arbitrator has jurisdiction to adjudicate upon the dispute in conformity with Article 13(3) of the Rules of Conciliation and Arbitration of the ICC."

Treaties relating to diplomatic relations

111. There is a strong case for placing treaties relating to diplomatic relations within the class of agreements which are not necessarily terminated or suspended in

[127] *International Law Reports*, vol. 74, p. 559, at p. 564.

[128] *Lanificio Branditex v Società Azais e Vidal*, ibid., vol. 71, p. 595. See also the Swiss decision concerning the Protocol on Arbitration Clauses: *Telefunken v N. V. Philips, International Law Reports*, vol. 19, p. 557 (Federal Tribunal).

[129] *International Law Reports*, vol. 67, p. 611 at p. 629; award of 18 December 1967.

case of an armed conflict. While the experience is not well documented, it is not unusual for embassies to remain open in time of armed conflict. In any case the express provisions of the Vienna Convention on Diplomatic Relations indicate its application in time of armed conflict. Thus article 24 provides that the archives and documents of the mission shall be inviolable "at any time", and this phrase was added during the Vienna Conference in order to make clear that inviolability continued in the event of armed conflict.[130] Other provisions include the words "even in case of armed conflict": see article 44 on facilities for departure. Article 45 is of particular interest and provides as follows:

> "If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:
>
> "(a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
>
> "(b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;
>
> "(c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State."

112. The principle of survival is recognized by Professor Chinkin[131] and in the Secretariat Memorandum.[132] The specific character of the regime reflected in the Vienna Convention on Diplomatic Relations was described in emphatic terms by the International Court of Justice in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*. In the words of the Court:[133]

> "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of articles 44 and 45 of the Convention of 1961. (cf. also articles 26 and 27 of the Convention of 1963.) Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the

[130] See Denza, *Diplomatic Law*, 2nd ed., 1998, p. 160.

[131] *Yale Journal of World Public Order*, vol. 7 (1980-81), p. 177 at pp. 194-195.

[132] Secretariat Memorandum, para. 36.

[133] ICJ Reports, 1980, p. 3 at p. 40, para. 86.

inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State."

113. The Vienna Convention on Diplomatic Relations of 1961 was in force for both Iran and the United States. In any event the Court made it reasonably clear that the applicable law included "the applicable rules of general international law", and that the Convention constituted a codification of the law.[134]

Treaties relating to consular relations

114. As in the case of treaties relating to diplomatic relations, so also in the case of treaties relating to consular relations there is a strong case for placing such treaties within the class of agreements which are not necessarily terminated or suspended in case of an armed conflict. It is well recognized that consular relations may continue even in the event of war or severance of diplomatic relations.[135] The express provisions of the Vienna Convention on Consular Relations indicate its application in time of armed conflict. Thus article 26 provides that the facilities to be granted by the receiving State to members of the consular post, and others, for their departure, shall be granted "even in case of armed conflict". And article 27 provides that the receiving State shall, "even in case of armed conflict", respect and protect the consular premises.

115. The principle of survival is recognized by Professor Chinkin[136] and also in the Secretariat Memorandum.[137]

116. The International Court of Justice in the judgment in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* gave emphasis to the special character of the two Vienna Conventions of 1961 and 1963 (see para. 112 above).

117. The Vienna Convention on Consular Relations was in force for both Iran and the United States. Moreover, the Court recognized that the Convention constituted a codification of the law and made it reasonably clear that the applicable law included "the applicable rules of general international law".[138]

118. The practice of States relating to the consular provisions in bilateral treaties is not very coherent.[139] More information, and particularly upon recent practice, is needed.

Draft article 8
Mode of suspension or termination

In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the Law of Treaties.

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[134] ICJ Reports, 1980, p. 24, para. 45; p. 41, para. 90 and (in the *Dispositif*), p. 44, para. 95.
[135] Lee, *Consular Law and Practice*, 2nd ed., 1991, p. 111.
[136] *Yale Journal of World Public Order*, vol. 7 (1980-81), p. 177 at pp. 194 and 195.
[137] Secretariat Memorandum, para. 36.
[138] ICJ Reports, 1980, p. 24, para. 45; p. 41, para. 90, and (in the *Dispositif*), p. 44, para. 95.
[139] See Rank, *Cornell Law Quarterly*, vol. 38 (1952-1953), pp. 341-55; McIntyre, *Legal Effect of World War II on Treaties of the United States*, 1958, pp. 191-199.

Comment

119. The point in play here stems from the consideration that suspension or termination does not take place ipso facto and by operation of law. Accordingly, the question of form needs to be addressed. It is to be noted that this provision does not propose the application of articles 42 to 45 of the Vienna Convention as such (see art. 73).

Draft article 9
The resumption of suspended treaties

1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:

(a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties;

(b) With the nature and extent of the armed conflict in question.

Comment

120. Draft article 9 constitutes the further development of draft article 4, which lays down the general criterion of intention.

121. The Vienna Convention on the Law of Treaties provides the following rules on the interpretation of treaties, both bilateral and multilateral:

"*Article 31*
"*General rule of interpretation*

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

"2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

"(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

"(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

"3. There shall be taken into account together with the context:

"(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

"(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

"(c) Any relevant rules of international law applicable in the relations between the parties.

"4. A special meaning shall be given to a term if it is established that the parties so intended.

"*Article 32*
"*Supplementary means of interpretation*

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31;

"(a) Leaves the meaning ambiguous or obscure; or

"(b) Leads to a result which is manifestly absurd or unreasonable."

Paragraph 2 (b) is intended to incorporate the substance of paragraph 1 (b) of draft article 2.

Draft article 10
Legality of the conduct of the parties

The incidence of the termination or suspension of a treaty shall not be affected by the legality of the conduct of the parties to the armed conflict according either to the principles of general international law or the provisions of the Charter of the United Nations.

Comment

122. There is an important point of policy and legal security involved. In the absence of an authoritative basis for a determination of an illegality, the unilateral assertion of illegality would be self-serving and inimical to stability of relations. In any event the following draft article consists of a reservation of the legal effects of binding decisions of the Security Council under Chapter VII of the Charter of the United Nations.

123. A separate consideration is the legislative policy to avoid trenching upon questions of the legality of the use or threat of force and the application of the provisions of the Charter. The resolution of the Institute of International Law, adopted in 1985, included the following provisions:

"*Article 7*

"A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.

"*Article 8*

"A State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the pace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution.

"*Article 9*

"A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State."

Draft article 11
Decisions of the Security Council

These articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.

Comment

124. The proviso is not strictly necessary but is none the less useful in an expository draft. It may be recalled that article 75 of the Vienna Convention provides as follows:

"*Case of an aggressor State*

"The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

Draft article 12
Status of third States as neutrals

The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict.

Comment

125. This proviso is not strictly necessary but has a pragmatic purpose.

Draft article 13
Cases of termination or suspension

The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:

(a) The agreement of the parties; or

(b) A material breach; or

(c) Supervening impossibility of performance; or

(d) A fundamental change of circumstances.

Comment

126. Once again it can be said that such a reservation states the obvious. However, it is believed that the clarification has some significance.

Draft article 14
The revival of terminated or suspended treaties

The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.

Comment

127. This reservation has the specific purpose of dealing with the situation in which the status of "pre-war" agreements is ambiguous and it is necessary to make an overall assessment of the treaty picture. Such an assessment may, in practice, involve the revival of treaties the status of which was ambiguous or which had been treated as though terminated by one or both of the parties.

Annex

Text of draft articles

Draft article 1
Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

Draft article 2
Use of terms

For the purposes of the present draft articles:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(b) "Armed conflict" means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Draft article 3
Ipso facto termination or suspension

The outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties as:

(a) Between the parties to the armed conflict;

(b) Between one or more parties to the armed conflict and a third State.

Draft article 4
The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

(a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(b) The nature and extent of the armed conflict in question.

Draft article 5
Express provisions on the operation of treaties

1. Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice

to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

2. The outbreak of an armed conflict does not affect the competence of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.

Draft article 6
Treaties relating to the occasion for resort to armed conflict

A treaty, the status or interpretation of which is the subject matter of the issue which was the occasion for resort to armed conflict, is presumed not to be terminated by operation of law, but the presumption will be rendered inoperable by evidence of a contrary intention of the contracting parties.

Draft article 7
The operation of treaties on the basis of necessary implication from their object and purpose

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

2. Treaties of this character include the following:

(a) Treaties expressly applicable in case of an armed conflict;

(b) Treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

(c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

(d) Treaties for the protection of human rights;

(e) Treaties relating to the protection of the environment;

(f) Treaties relating to international watercourses and related installations and facilities;

(g) Multilateral law-making treaties;

(h) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(i) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

(j) Treaties relating to diplomatic relations;

(k) Treaties relating to consular relations.

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Mode of suspension or termination

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